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No. 508

# In the Supreme Court of the United States

OCTOBER TERM, 1959

HENRY MARKS, PETITIONER

*v.*

UNITED STATES OF AMERICA

*Petition For a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit*

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ALBUQUERQUE, NEW MEXICO

December 3, 1958

The Honorable
James R. Browning, Esquire
Clerk of the Supreme Court
of the United States
Washington 25, D. C.

Re: MARKS V. UNITED STATES
No. 508, Oct. Term, 1958

Dear Mr. Browning:

On November 10, 1958, as attorney for Petitioner Henry Marks, I filed a Petition for a Writ of Certiorari in your Court in the case entitled:

> Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

Unfortunately, the word denied was inadvertently omitted in the Question Presented.

The purpose of this letter is to correct the omission by inclusion of the underlined word.

QUESTION PRESENTED

Whether the refusal of the District Court to permit the jury to hear evidence concerning a Lie Detector Test which the Petitioner voluntarily took denied defendant a fair trial and deprived him of due process of law.

Would you please distribute copies of this letter to the individuals and Supreme Court Justices who received copies of this brief. Your cooperation in this matter will very much be appreciated by the Petitioner and myself.

Very truly yours,

David G. Housman

DAVID G. HOUSMAN

DGH:im

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## CITATIONS

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Statute:

Rule 26 of The Federal Rules of Criminal Procedure

# In the Supreme Court of the United States

OCTOBER TERM, 1959

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No. ——

HENRY MARKS, PETITIONER

*v.*

UNITED STATES OF AMERICA

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*Petition For a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit*

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The Petitioner, by his attorney, David G. Housman, prays that a writ of certiorari issue to review the judgment entered on October 13, 1958, by the United States Court of Appeals for the Tenth Circuit, in Number 5793, affirming the conviction of Petitioner Henry Marks in the United States District Court for the District of New Mexico in Cause No. 19,379, Criminal.

## OPINION BELOW

The opinion of the Court of Appeals for the Tenth Circuit, Appendix A, infra, pp. 7, 17 has not yet been reported.

## JURISDICTION

The judgment of the Court of Appeals was entered on October 13, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

## QUESTION PRESENTED

Whether the refusal of the District Court to permit the jury to hear evidence concerning a Lie Detector Test which

the Petitioner voluntarily took defendant a fair trial and deprived him of due process of law.

STATUTE INVOLVED

Involved is Rule 26 of the Federal Rules of Criminal Procedure, providing for the admissibility of evidence according to the common law as interpreted by the Courts of the United States in the light of reason and experience.

STATEMENT

The Petitioner was convicted of violating 18 U.S.C. 201 in that on April 24, 1957, he did offer, tender and give the sum of One Thousand ($1,000.00) Dollars to an officer of the United States, to-wit: Special Agent Peter F. Geissler of the Internal Revenue Service with the intent to influence the decision or action of the said Special Agent on a question, matter or proceeding which was at such time pending before the said Special Agent in his official capacity as Special Agent of the Internal Revenue Service. The Petitioner admitted giving the money to the Special Agent, but contended that he was entrapped in that the idea of the bribe first originated in the mind of the Special Agent. As stated in the opinion of the Court below, there was a sharp and irreconcilable conflict in the evidence. The very crux of the issue in this case was as to who first conceived the idea for the payment of money; who made the contact and approach.

To buttress Petitioner's own testimony, he offered evidence concerning a lie detector test that he voluntarily and on his own initiative took before the trial, which test was administered by Albert H. Hathaway, a former Captain of the New Mexico State Police and who Petitioner contended was a polygraph expert possessed of the qualifications to do that work and to testify concerning the result of such test. The District Judge refused to admit the tendered testimony. It is the contention of the Petitioner that testimony concerning this test and of the results thereof

were admissible as bearing on his defense of entrapment, and as bearing on the truthfulness of the Petitioner when he testified that the idea of the bribe originated with the prosecuting witness and not the Petitioner; and that the payment of said sum of One Thousand ($1,000.00) Dollars was first suggested by the prosecuting witness. Therefore, the refusal of the trial judge to admit this evidence materially prejudiced his case.

The Petitioner was sentenced to imprisonment for eighteen (18) months and to pay a fine of One Thousand ($1,000.00) Dollars. He appealed this conviction to the Court of Appeals for the Tenth Circuit and the latter Court affirmed the conviction.

REASONS FOR GRANTING THE WRIT

Rule 19.1 (b) of the Rules of this Court state that a ground for granting this Writ is present where a Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court.

To the best of the writer's research, this Court has not yet passed upon this question. The Court of Appeals in *Frye* v. *United States*, 293 F. 1013 (C.A. for the District of Columbia, 1923) rejected proffered testimony on the lie detector test in a criminal case on the ground that the test did not have such a scientific recognition among psychological and physiological authorities as would justify the courts in admitting expert testimony on defendant's behalf. There the Court based its decision because the lie detector principle was not sufficiently established to have gained general acceptance in the particular field in which it belongs.

The *Frye* decision has been unanimously followed in the lower Federal Courts and all reported State decisions with one notable exception, *People* v. *Kenny*, 3 N.Y. Supp. 2d 348 (1938). In this case the trial court admitted the evidence of a lie detector test over objection of the prosecuting attorney and permitted the jury to consider the witness' opinion as to the defendant's innocence or guilt.

However, an opening wedge in permitting testimony on lie detector tests was first made in the case of *People* v. *Houser*, 193 P. 2d 937 (Cal.1948) when the appellate tribunal sustained the trial court's admission of the evidence when both parties in this criminal case stipulated to the admission.

The argument legally advanced of the lack of scientific recognition of these tests seems to carry little weight when one considers the fact that these tests are administered by nearly every police and investigative agency, including all of the Armed Forces, and the U. S. Secret Service. It is indeed difficult to understand why many individuals are released before trial as a result of these tests but the same test results cannot be brought before a jury to consider in passing upon the innocence of an accused.

The *Frye* decision was handed down in 1923. Since that date we have witnessed the ushering in of the atomic age, the space rocket, and other scientific advances and inventions that were never even dreamed of thirtyfive (35) years ago. At the time the *Frye* decision was rendered, very few law enforcement agencies used these tests. But today acceptance among these agencies is almost universal. Surely these law enforcement bodies must be satisfied with the scientific recognition of these tests. And it must be remembered that law enforcement agencies are best equipped by reason of their work to know if these tests have true scientific value.

What was true thirtyfive (35) years ago is not necessarily true today. While the deeply entrenched judicial principle of staere decisis is entitled to due veneration, it cannot be allowed to stand in the face of changing facts and progress. Today the polygraph examination has reached the point where it has attained scientific recognition among law enforcement bodies that merits its consideration by juries.

The legal impediments presently in existence as to the

admissibility in evidence of these tests were similar to those which faced the introduction of fingerprints, handwriting and other test evidence. The Courts lifted the curtain on admissibility on such evidence when its acceptance outside of the Courts was generally recognized.

Deeply entrenched in our legal system is the right of the accused to have the presumption of innocence. This is based on the theories that it is better to free ten guilty men than convict one innocent man, and the natural inference of guilt that is imbedded in the mind of the average juror by reason of the accusation. It is, then, difficult to understand why the defendant in a criminal case should not have the right to offer evidence of a lie detector test to prove his innocence. And this is especially true in criminal cases where the prosecution case is based mainly on the verbal testimony of one or two witnesses.

In the case at bar conviction was based almost entirely on the testimony of the Special Agent that the Petitioner first offered the bribe. The Petitioner testified that the bribe originated with the Special Agent, and it was for the jury to decide which individual told the truth. The Court is well aware of many cases where the accused is convicted on such testimony and at a later date it is discovered that the accused was innocent.

When there is a sharp conflict of testimony, and no documentary or other evidence in the case, the refusal of a trial court to admit lie detector evidence offered by the accused deprives him of a fair trial. Wtih the high degree of accuracy of these tests, it is quite conceivable that they would be more reliable than verbal testimony in some cases. And where there is sharp conflict of verbal testimony, these tests could be of immeasurable help in assisting the jury to resolve the conflict. And if these tests are used by law enforcement agencies to clear a suspected or accused individual, there is no sound reason why the results of lie detector tests should not be made available to the jury, especially

when proffered by a criminal defendant.

This is not a case where the test was involuntarily administered or offered by the prosecution so as to raise the question of the fifth amendment. The Petitioner took this test on his own initiative to prove he was not guilty, and the test clearly shows this. To arbitrarily withhold results of a lie detector test from juries that are on the whole far more enlightened and educated than the juries in 1923 (date of the *Frye* case) seems most unreasonable and deprives an accused of a sound and substantial defense.

Doubtless the admission of these tests in criminal cases when voluntarily taken and offered by a defendant would pose some problems to the Courts. Among these problems are the qualifications of the examiner, the reliability of the tests and the conditions and time of the examination. However, the Courts have faced similar situations involving appraisers, estimators, physicians, etc. and have satisfactorily resolved these problems by adequate and cautionary instructions to the jury. And the other side can always offer rebuttal testimony for jury consideration.

Furthermore the fact that these problems exist is far more outweighed by the fact that the admission of this type of evidence can free an innocent man, which is of paramount importance.

The Petitioner feels that if the jury would have been permitted to receive this testimony, he would have not been convicted, and the refusal of the trial court to admit this evidence denied him a fair trial and due process of law.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

DAVID G. HOUSMAN
*Attorney for Petitioner.*
GRANTHAM, SPANN & SANCHEZ
by EVERETT M. GRANTHAM
*Of Counsel.*

## APPENDIX A

United States Court of Appeals
Tenth Circuit

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September Term, 1958

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HENRY MARKS,
Appellant,
vs. Number 5793
UNITED STATES OF AMERICA,
Appellee.

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APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

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Everett M. Grantham (Messrs. Spann & Sanchez were with him on the brief) for Appellant;

James A. Borland, United States Attorney, for Appellee.

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Before BRATTON, *Chief Judge*, HUXMAN and LEWIS, *United States Circuit Judges*.

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HUXMAN, *Circuit Judge*.

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Appellant, Henry Marks, was indicted, tried and convicted by a jury in the United States District Court for the District of New Mexico of violating 18 U.S.C.A. § 201. The indictment charged that he offered and gave a bribe of $1,000 to an Officer of the United States, a Special Agent for the Internal Revenue Service, with intent to influence his decision in a matter pending before the Agent at the time. His appeal challenges the judgment of the Court on

five grounds. The assignments of error will be considered in the following order.

It is urged that the Court erred in permitting the case to go to the jury, because of the insufficiency of the evidence to sustain a verdict of guilty. To resolve this question, it will be necessary to consider primarily the evidence of the prosecuting witness, Peter F. Geissler, and of appellant, Henry Marks. Geissler was an Agent of the United States Internal Revenue Department assigned to Albuquerque, New Mexico. In his official capacity, he was engaged in investigating the income tax returns of Hub Enterprises, Inc., of which Marks was the Managing Officer. During the investigation, Marks paid Geissler $1,000 in cash to influence his action in the investigation. The whole case turned on whether the giving of the bribe originated with Marks, or whether the suggestion of giving a bribe came first from Geissler, and whether Marks then took the bait offered by the Agent.

Geissler, the prosecuting witness, testified in substance as follows: On March 11, 1957, he and Agent Butler contacted Marks at appellant's place of business and informed him that the returns of Hub Enterprises for the years 1953, 1954 and 1955 were under investigation. On March 28, Geissler and Butler had a conference with Marks at his office with reference to certain records. A number of conferences were held between the parties, at which various matters pertinent to the investigation were discussed. On April 24, Geissler called Marks at his office to ascertain what progress he was making in securing certain required data. Marks replied that he was assembling the data and suggested they have a cup of coffee together. Geissler suggested they meet at the Court Cafe. Marks replied that it was too crowded and suggested they meet at the corner of Second and Silver. Before Geissler went to the meeting, he suggested to his Associates that he be searched. He was

searched and all his money except forty-five cents was taken from him. Before meeting Marks, Geissler suggested that he be put under surveillance. He then left for the rendezvous where he met Marks. Marks suggested that they take a ride, but Geissler declined. Marks then suggested they have a cup of coffee at the City Cafe. They went to the Cafe where they occupied a booth. Marks asked how the investigation was coming. He inquired about Geissler's son's health, and also asked if he had a sewing machine. Geissler replied, "No," but that he could use one. Marks suggested that he would like to send one to the house. He also asked whether Geissler had a Frigidaire. He replied he had a second hand one and Marks suggested he could send a new one very cheap. Marks also inquired whether Geissler's wife was employed. When he was informed that she was a secretary but was unemployed, Marks stated that he and a group were forming a new concern and could use a secretary and would be glad to give his wife consideration. After considerable discussion, Marks said, "Pete, I would like to see this matter brought to a halt, to clean it up" and he said, "I would give you a thousand dollars to terminate the investigation." Geissler's reply was "That is up to you." Marks went to the bank to get the $1,000, and they agreed to meet at the Hilton Drug Store. About ten minutes later, they met at the Hilton Drug Store. After some colloquy, the money was passed across under the table. Geissler took it and informed Marks that he was under arrest. Marks was then delivered to the Federal authorities.

Wilson, a Special Agent, testified that he searched Geissler before he met Marks and took his money from him; that he kept Geissler under surveillance; that he saw him and Marks in the City Cafe; that he heard some of the conversation between Geissler and Marks in the booth; that he heard Marks say, "How is it going?" and Geissler replied, "Well, he was working on it"; that he heard the

word sewing machine mentioned, but because of the noise he could not hear much of the conversation. He went to the Hilton Hotel, but did not see Geissler, and finally returned to the office.

With respect to the occurrences on the 24th, Marks testified that Geissler called him and asked about the closing costs on a house transaction and that he replied he would give him the information when it was furnished to him, and that Geissler then said, "Let's have a cup of coffee," to which he replied to come over and meet him at his place. Geissler replied that he would meet him at the corner of Second and Silver; that they met there, and went from there to the coffee shop; that they sat down and both ordered a cup of coffee; that while sitting in the booth Geissler said, "Do you have a thousand dollars for me to close this case?"; that he replied "Well, I don't have a thousand dollars for you"; I said, "I would have to borrow the thousand dollars if you want a thousand dollars"; and he said, "I have a sick kid and I don't make much money." He testified that Geissler also told him his wife wasn't working and he had a sick kid and was not making much money. Marks testified positively that he never offered Geissler any money to take care of the case and that the suggestion for the money came first from Geissler; that Geissler personally asked him for $1,000 to settle the case and that Geissler said, "I could make it good or bad for you."

Mrs. Marks testified that she listened in on an extension phone to the conversation on the 24th between Geissler and her husband, and that Geissler made the suggestion that he and Marks meet for coffee.

From the above outline of the evidence must be determined whether the Government made a case to go to the jury. There is no conflict or uncertainty in the applicable principles of law to determine the burden resting on the Government to make a jury case. There was a sharp and ir-

reconcilable conflict in the evidence. Geissler testified positively that the first suggestion of a bribe came from Marks and that at no time had he suggested a pay-off to him. Marks, on the other hand, testified just as positively that the suggestion of the payment of $1,000 came from Geissler, and that at no time did he offer to pay him $1,000 to settle the case, and that he paid the $1,000 only after he had been first solicited by Geissler. If the jury believed Marks, there was entrapment, and he could not be convicted of the offense charged. On the other hand, if the jury believed Geissler, as it evidently did, Marks was guilty of the offense with which he was charged. The case was properly submitted to the jury for its determination.

It is urged that the Court erred in refusing to give appellant's instructions Numbers 1 and 2.[1] We do not con-

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[1] "Defendant's Requested Instruction No. 1:

"Since members of this jury panel have sat in a number of criminal cases at this term of court in which informers or decoys were used by the Government for the purpose of detecting crime, the Court feels constrained to give you the following cautionary instruction.

"There is a difference, in law, between the use of informers and decoys for the purpose above set out and the entrapment of a defendant by an agent of an investigative agency of the United States. There are many instances where it is necessary to resort to the use of decoys for such purposes, and no criticism can be offered for such method.

"On the other hand, the Government of the United States frowns on the entrapment of one of its citizens by an officer or agent charged with the duty of investigating alleged offenses against the United States. The question for determination is: As between the prosecuting witness and the defendant, in whose mind did the idea of a bribe or gratuity originate. Therefore, in this case, if you find and believe from the evidence and beyond a reasonable doubt that the idea for the tendering of a bribe or gratuity originated in the mind of the defendant Henry Marks and that he was the aggressor in offering, tendering and giving such a bribe or gratuity to the

sider whether appellant properly preserved his right to challenge the Court's instructions by making timely and proper objections thereto, because we believe the Court correctly instructed the jury as to the law of entrapment. A defendant is not entitled to have the Court instruct the jury in any particular words or in the language of his requested instruction.[2] If adequate and proper instructions are given, he has no cause for complaint.

The Court gave careful consideration to its instruction on entrapment. The substance of the Court's instruction

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prosecuting witness, if such a bribe was offered, tendered and given, then your verdict should be guilty.

"If, on the other hand, you fail to find from the evidence to your satisfaction and beyond a reasonable doubt that the idea of a bribe or gratuity originated in the mind of the defendant Henry Marks, then your verdict should be not guilty. It is not necessary that the defendant Marks prove beyond a reasonable doubt that such an idea originated in the mind of the prosecuting witness; the converse of this proposition is true; that is, that the jury must find and believe from the evidence and beyond a reasonable doubt that such an idea originated with the defendant Marks in order to return a verdict of guilty."

Defendant's Requested Instruction No. 2.

"You are instructed that evidence has been introduced by the prosecution tending to show that at the time of the alleged acts of the defendant, the defendant Marks was under investigation by the prosecuting witness Geissler in his official capacity concerning a matter in connection with income tax returns filed by the defendant. That such an investigation was pending is one of the material allegations which the Government must prove to your satisfaction and beyond a reasonable doubt in order for you to return a verdict of 'guilty' to the charge contained in the indictment in this case. However, whether the defendant is or is not guilty of any offense, and whether the defendant is or is not liable civilly or criminally, in connection with such investigation is wholly immaterial in this case. The jury should not speculate as to what such an investigation, if pending, will or will not disclose."

[2] *Watts* v. *United States*, 212 F. 2d 275; and cases there cited.

was that if the jury believed from the evidence that Marks was induced to violate the law by the insistence, requests and persuasions of Geissler, then the verdict must be not guilty, because it was not the policy of the courts to uphold a conviction where the offense was committed through the instigation of the Goevrnment's agents. The Court told the jury that when an officer induces one to violate the law, who has no intention of committing crime, the Courts will not lend their aid in punishing a person thus lured into crime. But the Court said that if the defendant acted with a willingness and desire to violate the law and makes an offer, tender or gift as his own idea, then he would be guilty. This is the substance of what the Court told the jury and clearly states the principles applicable to entrapment. From the Court's instruction, the jury could have no difficulty in concluding that the decisive question was; did the offer of the bribe first originate in the mind of Marks or did he only offer the bribe after it was first suggested by Geissler. The complaint that the instruction did not specifically state that the Government must prove entrapment beyond a reasonable doubt is not well taken. Throughout the instructions, the Court repeatedly told the jury that the Government must prove every element of the offense to the jury's satisfaction beyond a reasonable doubt. It was not necessary to repeat this admonition in every instruction.

Appellant complains because the Court refused to give his requested instruction Number 2, in which he requested the Court to tell the jury that in determining whether Marks was guilty of the charge it must not consider whether he was civilly or criminally liable in connection with the investigation of his income tax status. It is contended that this instruction was warranted by the testimony of Geissler that Marks' tax liability was under investigation. But that testimony was only preliminary to laying the foundation to establish why Geissler contacted Marks. There was nothing

therein from which one could draw the conclusion that Marks was civilly or criminally liable.

Complaint is made of the ruling of the Court refusing appellant's offer to introduce in evidence the result of a lie-detector test, to which he submitted. Appellant's attorney, with commendable candor, concedes that the authorities do not generally sustain him in this connection. He nonetheless asks us to consider and question and give our approval to the use of such testimony. The question apparently was first considered by the federal courts in *Frye* v. *United States*, 293 Fed. 1013. The Court there rejected the use of such evidence and as a reason therefor stated:

> "* * * Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.
>
> "We think the systolic blood pressure deception test has not yet gained such standing and scientific recognition among physiological and psychological authorities as would justify the courts in admitting expert testimony deduced from the discovery, development, and experiments thus far made."

Since then, a considerable number of courts have considered such evidence and with the exception of *People* v. *Kenny*, 3 N.Y.S. 2d 348, they have refused to receive such evidence, adopting in substance the statement quoted from the *Frye* case, supra. While we have not exhausted the authorities,

some of the cases so holding are listed in footnote three.[3] We have considered the question and are inclined to hold to the reasoning of the courts which have refused to receive such evidence.

It is further urged that the Court erred in permitting the jury to hear and consider statements attributed to one Scalon and in failing to strike such testimony upon motion and objection. A consideration of this assignment requires a statement as to Scanlon's place in the picture. James Scanlon was known casually to Geissler as a tax consultant and former Special Agent of the Intelligence Division. Scanlon contacted Geissler in Albuquerque on March 23, 1957, and again on March 24, and told Geissler that he might be called into the Marks case. So far as the record shows, those were the only dates on which Geissler and Scanlon met personally. On direct examination, Geissler testified that he had a telephone conversation with Scanlon on April 21, the call originating from Briar Cliff, New York; that as a result of that conversation he made a report to his superiors. When he was asked to state the substance of the report, an objection was sustained on the ground that the answer called for hearsay. Nothing further was developed on direct examination by the prosecution with respect to Scanlon. On cross-examination, Geissler was asked, "Now, as a matter of fact, Mr. Geissler, who first suggested the sum of one thousand dollars to be paid to you in this case?" The answer was

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[3] *People* v. *Wochnick*, 219 P. 2d 70;
*Frye* v. *United States*, 293 F. 1013;
*Henderson* v. *State (Okla.)*, 230 P. 2d 495;
*Commonwealth* v. *Dilworth (Pa.)* 115 A. 2d 865;
*Kaminski* v. *State (Fla.)* 63 So. 2d 339;
*State* v. *Bohner*, 246 N.W. 314;
*State* v. *Kolander (Minn.)* 52 N.W. 2d 458;
*People* v. *Welke (Mich.)* 68 N.W. 2d 759;
*People* v. *Davis (Mich.)* 72 N.W. 2d 269.

"Mr. Scanlon." Appellant's attorney then moved that the answer be stricken on the ground there was no evidence of agency, and also on the ground that it was hearsay.

There is no evidence which would support a finding that Scanlon was Marks' agent authorized to act for him in the matter under investigation. But the admissibility of the answer does not depend upon whether Scanlon was Marks' agent. Neither did the question call for hearsay, as contended for by appellant. Geissler was not asked to repeat the conversation with Scanlon. That would be hearsay. All that was asked was the name of the person who first suggested the bribe to him. That called for a fact answer. Had Geissler refused to give the name, he could have been compelled to answer. Had he been asked what Scanlon said, or in whose behalf he offered the bribe, that would have been hearsay. We find no error in the Court's refusal to strike the challenged evidence.

Finally, it is urged that the judgment should be reversed because of misconduct on the part of the District Attorney in his closing argument to the jury. In his closing argument, the District Attorney said that Scanlon was then under investigation. There is no basis in the record warranting such a statement. It was improper and should not have been made. The defendant objected to the statement at the time it was made, asked that it be withdrawn from the jury, and the jury instructed to disregard it. The motion was not sustained by the Court.

After the jury had been deliberating for some time, they were called into the courtroom at 6:09 p.m. and informed they might go to dinner. At the time, the Court on its own volition brought up the matter of the challenged part of the argument and stated to defendant's attorney that if he desired the Court would instruct the jury to disregard the District Attorney's statement that Scanlon was under investigation. Receiving an affirmative answer, the Court in-

structed the jury that "during Mr. Borland's closing argument he referred to the fact that the man Scanlon was under investigation in New York. And, 'I instruct you now that you will disregard that remark by the District Attorney as you further consider your deliberations in this case."

It is not all misconduct or improper argument that will require granting a new trial or a reversal on appeal. It is only when such conduct can present a question whether there is reason to believe that it influenced the jury's verdict that the failure to take appropriate steps to remove it will warrant a reversal. While, as stated, the remark was improper, it was as to a collateral matter and it is doubtful whether it could have influenced the jury. While the Court did not withdraw the remarks from the jury's consideration and instruct it not to consider them at the precise time they were made, it did so shortly thereafter while the jury was still considering the case. It is our conclusion that the Court's further instruction to the jury with respect to these remarks, while the jury was still considering the case, was sufficient to remove any impression the jury might have gained from the remarks and that its verdict was not influenced thereby.

A careful consideration of the entire record leads us to the conclusion that there is no reversible error and the judgment is, therefore, AFFIRMED.

## APPENDIX B

United States Court of Appeals
Tenth Circuit

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No. 5793

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HENRY MARKS, APPELLANT,

*vs.*

UNITED STATES OF AMERICA, APPELLEE.

---

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

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Before CARL A. HATCH, *United States District Judge.*

*Judgment and Commitment.*

On this 18th day of November, 1957 came the attorney for the government and the defendant appeared in person and by his attorney, Everett M. Grantham, Esquire.

It is Adjudged that the defendant has been convicted upon his plea of Not Guilty and a verdict of Guilty of the offense of attempted bribery of an officer of the United States, in violation of Section 201, Title 18, United States Code, as charged in the Indictment, and the Court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It is Adjudged that the defendant is guilty as charged and convicted.

It is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Eighteen

(18) months, and that he pay to the United States of America a fine in the sum of One Thousand ($1,000.00) Dollars, and that he stand committed until the said fine is fully paid or until he is otherwise discharged by operation of law.

It is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

CARL A. HATCH,
*United States District Judge*

Filed Nov. 18, 1957

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FILED
DEC 10 1958
JAMES R. BROWNING, Clerk

No. 508

# In the Supreme Court of the United States

OCTOBER TERM, 1958

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HENRY MARKS, PETITIONER

v.

UNITED STATES OF AMERICA

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*On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit*

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

---

J. LEE RANKIN,
*Solicitor General,*

MALCOLM ANDERSON,
*Assistant Attorney General,*

BEATRICE ROSENBERG,
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# In the Supreme Court of the United States

OCTOBER TERM, 1958

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No. 508

HENRY MARKS, PETITIONER

*v.*

UNITED STATES OF AMERICA

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***On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit***

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINION BELOW

The opinion of the Court of Appeals (Pet. App. A) is not yet reported.

### JURISDICTION

The judgment of the Court of Appeals was entered on October 13, 1958. The petition for a writ of certiorari was filed on November 10, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTION PRESENTED

Whether the trial judge properly excluded the results of a lie detector test taken by petitioner on his own initiative and offered by him to support his claim that he was entrapped into giving a bribe.

## STATEMENT

Following a jury trial, held in the United States District Court for the District of New Mexico, petitioner was convicted of offering and giving a bribe in the sum of $1,000 to a Special Agent of the Internal Revenue Service, in violation of 18 U.S.C.201 (R.2,3,90). He was sentenced to imprisonment for 18 months and fined $1,000 (R. 3, 93). The Court of Appeals unanimously affirmed the conviction (Pet. App. A).

The pertinent facts are these:

1. In January 1957, Peter F. Geissler, of the Intelligence Division of the Internal Revenue Service was assigned to, and commenced, the investigation of the income tax returns of Hub Enterprises, Inc., of which petitioner was the managing officer, to determine whether there was evasion by that company of income taxes for the years 1953-1955 (R. 7-8). In the course of this investigation agent Geissler had contact with petitioner on several occasions in connection with obtaining certain records needed for the investigation (R. 8-9, 11-12, 14-16). According to the agent, on the morning of April 24, 1957, he called petitioner with reference to certain papers. Petitioner told the agent that he was in the process

of assembling the records and that the agent should join him for a cup of coffee. When the agent suggested "The Court Cafe," petitioner said it was too crowded and suggested that they meet on a certain street corner (R. 18). Before leaving his office, Giessler had himself searched by his fellow Agent Wilson, who removed all his money, and kept him under surveillance during his meeting with petitioner (R. 18-19, 44, 51-55).

At this meeting, after rejecting petitioner's first suggestion that they take a ride, the agent accepted petitioner's further suggestion that they have a cup of coffee (R. 20). While having coffee, petitioner wanted to know the progress of the investigation, inquired about the health of the agent's son and stated that he could refer him to an excellent physician. Petitioner told the agent that he would like to send him a sewing machine for his wife, and that he could get him a frigidaire quite inexpensively. When advised that the agent's wife had been a secretary, petitioner said that he was forming a new concern and would gladly consider her for a secretarial position (R. 20-21). Finally, petitioner said: "Pete, I would like to see this matter brought to a halt, to clean it up. I would give you a thousand dollars to terminate the investigation." The agent responded that it was up to him (R. 21). Thereupon, petitioner said that he would have to go to the bank to get the money and they agreed to meet a short time later in a nearby drugstore (R. 22). At this meeting, petitioner handed over a roll of bills totalling $1,000.

The agent then placed him under arrest (R. 22-24)[1]

2. Petitioner's defense was entrapment. He testified that Agent Geissler phoned him on the morning of the 24th of April, and when he advised the agent that the papers requested were not yet ready, the agent nonetheless suggested the meeting (R. 63). Petitioner's version of this meeting was that the agent asked him for a thousand dollars to close the case, saying that he had a sick child and his wife was unemployed (R. 63-64). The petitioner denied offering the agent a sewing machine. He admitted telling the agent he could get him appliances wholesale and offering to get him an appointment with a specialist for his child (R. 64). Petitioner testified that he gave the agent $1,000 which he borrowed from Hub Enterprises because he was frightened by the agent's ultimatum (R. 65, 66). He denied that he suggested the $1,000 pay-off, claiming that the proposition originated with agent Geissler (R. 65).

3. Just before petitioner rested his case, he offered to submit the results of a lie-detector test, taken on his own initiative, which he claimed established that the agent first proposed the $1,000 payment (R. 79). The test had been conducted by Albert H. Hathaway, a former captain of the New Mexico Police Department. The trial judge, sustaining the government's objection, excluded the evidence (R. 79-80), questioning the pertinency of the test, since, at best, it would

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[1] The first intimation that Geissler had that a bribe attempt would be made came on April 21, 1957 in conversation with a Mr. Scanlon who purportedly was representing petitioner (R. 27).

show only that the defendant was not lying but would not prove what agent Geissler had done. The trial judge submitted the entrapment issue to the jury after a careful charge (R. 84-85). In upholding the trial judge's exclusion of the lie-detector evidence, the Court of Appeals noted the unanimity of judicial opinion holding against its admissibility (Pet. App. A 15).

## ARGUMENT

The single issue pressed by petitioner is that reversible error was committed by the trial judge by virtue of his refusal to admit the lie detector evidence. We think this claim is plainly erroneous.

Although petitioner acknowledges the almost complete accord of judicial opinion to the effect that polygraph examinations are inadmissible in evidence,[2] he nevertheless asks this Court to override these pre-

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[2] See *e.g.*, *Frye* v. *United States*, 293 Fed. 1013 (C.A. D.C.); *State* v. *Bohner*, 210 Wisc. 651, 657-658; *People* v. *Becker*, 300 Mich. 562, 565-566; *State* v. *Lowry*, 163 Kan. 622, 627-630. Petitioner notes, as an exception to this general view, a decision by a lower court of New York in *People* v. *Kenny*, 167 Misc. 51. But this decision was never subject to appellate review and shortly after it was rendered, the results of a lie-detector test, deriving from the very same polygraph technique utilized in the *Kenny* case, were excluded in *People* v. *Forte*, 167 Misc. 868, a holding affirmed by the New York Court of Appeals (279 N.Y. 204).

Of course, different considerations obtain where the parties stipulate to the results of the test and consent to its admission. For an extensive review of the decided cases on this subject, see Inbau and Reid, *Lie Detection and Criminal Interrogation*, 122-127, 132-135 (3d ed. 1953); Wicker, *The Polygraphic Truth Test and The Law of Evidence*, 22 Tenn. L. Rev. 711, 715-723 (1953).

cedents on the ground that the technique is now scientifically accurate and has attained general scientific recognition. We see no occasion for this Court to consider the question. While constant advances are being made in the lie detector technique, and it is proving useful as an investigative tool, the view of authoritative commentators, as well as the courts, is that the polygraphic examination has not yet achieved the precision or scientific recognition essential to judicial admissibility.

Two leading authorities in the lie-detector field, Fred E. Inbau and John E. Reid, in their book *Lie Detection and Criminal Interrogation* (3rd ed. 1943), point out that, in order to meet the test of admissibility, lie detection first must be shown to have "a reasonable measure of precision in its indications," and, second, must be accepted by the "field of science to which it belongs." (p. 122). In neither of these two particulars, the authors conclude, has lie detection yet attained success. Among the defects noted the following seem most significant. There is no standardization as yet as to instrumentation, procedure in testing, or interpretation (p. 129).[3] Closely allied with this consideration is the fact that qualifications for examiners have not been sufficiently well stand-

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[3] See also, Arther, *Blood Pressure Rises on Relevant Questions In Lie Detection—Sometimes an Indication of Innocence Not Guilt*. 46 Journ. of Cr. Law 112 (1955); Burack; *A Critical Analysis of The Theory, Method, and Limitations of The "Lie Detector,"* 46 Journ. of Cr. Law 414 (1955); Sell, *Deception Detection and the Law*, 11 U. of Pitt. L. Rev. 210, 222 (1950).

ardized to enable a judge to determine if a particular examiner has the necessary expertise. There is no educational requirement nor uniform practice as to the experience necessary to operate a polygraph. "Under such circumstances it would be relatively easy for incompetent or dishonest persons to represent themselves as lie-detector experts and be given an opportunity to render inaccurate or perjured testimony for the party by whom they are employed" (*Ibid.*, p. 129).[4]

These factors attain particular significance since there might be a greater need for precision before admissibility is extended to the results of a deception test than would be required as to other scientific evidence (*e.g.*, ballistics, toxicology). Thus the latter type of scientific evidence is often not conclusive upon the crucial issues of the litigation and there would be a lesser chance of injustice flowing from the fact that the expert testimony might be erroneous. On the other hand, particularly in a criminal case, the results of the polygraph examination would normally go to the ultimate question of guilt or innocence and be deemed extremely significant. In light of this, there would obviously have to be exceptionally high standards with respect to polygraphic equipment, methodology, analysis and qualifications of the ex-

[4] See similarly Inbau, *Some Avoidable Lie-Detector Mistakes*, 40 Journ. of Cr. Law 791 (1950). Even an author who favors the admission of the tests recognizes that accepted professional qualifications have not been set for the examiners. Wicker, *The Polygraphic Truth Test and the Law of Evidence*, 22 Tenn. L. Rev. 711 (1953).

aminers, before such tests should be admitted, a condition which does not exist at the present time.[5]

As to the second criterion of admissibility—scientific acceptance and recognition—the polygraph technique does not yet pass muster. In a survey conducted in 1953, sixty-four per cent of the members of the American Psychological Association who replied to questionnaires disagreed with the statement that: "The fear of being found out and or conscious efforts to deceive are the main cause of significant reactions in polygraphic tests of deception." And a substantial body of pychological opinion, forty-nine per cent of the psychologists queried, would not favor the judicial admission of the tests. See Levitt, *Scientific Evaluation of The "Lie Detector,"* 40 Ia. L. Rev. 440, 456-457 (1955).[6]

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[5] As observed in a recent criticism: "Considering the tremendous weight that testimony obtained with a lie detector would carry in the courtroom, it is doubtlessly well that the courts have thus far been hypercautious about admitting it. The testimony of the ballistics or fingerprint expert is usually significant, but it is not always crucial. On the other hand, a demonstrated lie or truth to the question, 'Did you kill X?' would invariably be perfectly conclusive. Mechanical lie detection does not yet seem to have advanced to the point where it is dependable enough to furnish the entire basis of a court decision." Levitt, *Scientific Evaluation of The "Lie Detector,"* 40 Ia. L. Rev. 440, 458 (1955).

[6] This questionnaire was sent as well to the American Society for the Advancement of Criminology, The Society for the Detection of Deception, manufacturers of polygraphic equipment, and polygraph examiners. A full analysis of the results of the survey is contained in Cureton, *A Consensus As To The Validity of Polygraph Procedures*, 22 Tenn. L. Rev. 728 (1953).

Again, in 1944, the Forensic Section of the American Psychiatric Association adopted a resolution concluding that a polygraphic examination "can give valuable results *only in the hands of thoroughly trained physicians and psychologists* who will evaluate the data derived by applying other available methods and making use of all independently obtainable evidence" (emphasis added). Eliasberg, *Forensic Psychology*, 19 So. Cal. L. Rev. 349, 362 (1946).

In sum, while it may be that much of the scientific opinion is in the nature of " 'arm-chair' criticism," as suggested by Inbau and Reid, *supra*, p. 130, n. 75, still as these authors themselves conclude (pp. 131-132):

> . . . we should not be too hasty in our acceptance of proposed innovations. In the case of the lie-detector technique such a cautious attitude will operate not only in the best interests of the administration of justice but also to the ultimate advantage of the technique itself. A premature acceptance of the test results as legal evidence would undoubtedly occasion such a series of abuses and miscarriages of justice as to stigmatize forever the technique in the field of law as well as of science. It seems much wiser, therefore, to await a further development and standardization of the technique before admitting the test results as evidence in civil or criminal cases.

## CONCLUSION

For the foregoing reasons we do not believe that, at the present time, "reason and experience" or the

consensus of scientific opinion warrant a change, by judicial ruling, of the existing law that evidence of lie detector tests is inadmissible whether offered by the defense or prosecution. Cf. *Hawkins* v. *United States*, No. 20, decided November 24, 1958. It is respectfully submitted that the petition for certiorari should be denied.

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DECEMBER 1958.

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